

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Developing a Unified Inter-carrier
Compensation Regime

CC Docket No. 01-92

**COMMENTS OF THE
INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA**

The Information Technology Association of America (“ITAA”) hereby files these comments in response to the Commission’s Further Notice of Proposed Rulemaking (“*Notice*”) in the above-captioned proceeding.¹ ITAA agrees that the Commission must fundamentally reform the inter-carrier compensation regime. However, ITAA opposes any effort to extend the inter-carrier compensation regime to information (enhanced) service providers (“ISPs”). As the Commission has long recognized, ISPs are *end users* of communications services – not common carriers. The Commission, therefore, should not apply any *inter-carrier* compensation regime to ISPs. In particular, the Commission should reject the proposal, advanced by the Expanded Portland Group, to extend the current carrier access charge regime to certain ISPs.

STATEMENT OF INTEREST

ITAA is the principal trade association of the computer software and services industry. ITAA has 500 member companies located throughout the United States – ranging from major multinational corporations to small, locally based enterprises. ITAA’s members provide the public

¹ *Developing a Unified Inter-carrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 (2005) (“*Notice*”).

with a wide variety of information products, software, and services. ITAA's members include a significant number of information service providers.

During the last twenty-five years, ITAA (and its predecessor, ADAPSO) has actively participated in every Commission proceeding that has considered proposals to extend the carrier access charge regime – which governs the compensation that interexchange carriers must pay to local exchange carriers – to ISPs. ITAA has consistently urged the Commission not to do so.

I. BECAUSE INFORMATION SERVICE PROVIDERS ARE USERS OF TELECOMMUNICATIONS SERVICES – NOT CARRIERS – THE COMMISSION SHOULD NOT REQUIRE ISPs TO PAY INTERCARRIER COMPENSATION

The *Notice* appears to reflect a serious misunderstanding regarding the regulatory status of information service providers. The *Notice* states that “[s]ince 1983 . . . the Commission has *exempted* ESPs [enhanced service providers], now known as information service providers (ISPs), including those that provide service related to the Internet, from the payment of certain interstate access charges.”² This is simply incorrect. The term “ESP exemption,” while sometimes used as convenient shorthand, is a misnomer. The Commission has never “*exempted*” ISPs from paying carrier access charges. Rather, the Commission has repeatedly recognized that, because ISPs are end users – rather than carriers – they are *not subject to* the carrier access charge regime.

The Commission's 1983 *Access Charge Order* divided users of the local network into two categories: interexchange carriers and end users.³ End users compensate local exchange carriers for their use of the local telephone network by paying a mix of flat-rate Federal end user

² *Id.* at ¶ 7 (emphasis added).

³ See *MTS and WATS Market Structure*, Third Report and Order, 93 F.C.C.2d 241 (1983) (“*Access Charge Order*”), *aff'd sub nom. NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984).

charges and State charges. Interexchange carriers, by contrast, are subject to the Commission's carrier access charge regime.⁴ The Commission's carrier access charge rules, first adopted in the 1983 Order, make *no mention* of ISPs – much less purport to “exempt” ISPs from paying carrier access charges.⁵ Rather, from the beginning, the Commission has repeatedly and consistently concluded that ISPs are *users* of telecommunications services, which – like a number of other end users – connect jurisdictionally mixed private line networks to the local public switched telephone network (“PSTN”).⁶

Because ISPs are end users, they have always been allowed to pay the Incumbent Local Exchange Carriers (“ILECs”) the same combination of Federal and State charges as other end users with comparable network configurations.⁷ The Commission's treatment of ISPs as end

⁴ See generally *Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd 12962, 12965-66 (2000) (The access charge regime was adopted “in lieu of” earlier agreements between the pre-divestiture AT&T and MCI and the other long-distance competitors regarding payment for the use of the local network “for originating and terminating interstate calls.”).

⁵ See 47 C.F.R. § 69.5(b) (“Carrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.”); 47 C.F.R. § 69.2(m) (defining an “end user” as “any customer of an interstate or foreign telecommunication service that is not a carrier”).

⁶ See *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 F.C.C.2d 682, 711-22 (1983). The Commission's treatment of ISPs stands in stark contrast to its treatment of resellers – which the agency has consistently classified as carriers. At the time it adopted the *Access Charge Order*, the Commission created an *express* exemption for resale carriers. See *id.* at 769 (reprinting former Section 69.5 of the Commission's Rules). The Commission subsequently eliminated this exemption based on its conclusion that “resellers of private lines . . . [should] pay the same charges as those assessed on *other interexchange carriers* for their use of these local switched access facilities.” *WATS-Related and Other Amendments of Part 69 of the Commission's Rules*, Second Report and Order, CC Docket 86-1, ¶¶ 11-14, *reprinted in* 60 Rad. Reg.2d (P&F) 1542, 1548-49 (rel. Aug. 26, 1986) (emphasis added).

⁷ The Commission has repeatedly rejected proposals to extend the carrier access charge regime to ISPs. See, e.g., *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, 16133 (1997) (“*Access Charge Reform Order*”) (“ISPs should not be subject to interstate access charges.”); *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, 6 FCC Rcd 4524, 4534-35 (1991) (rejecting claims

users has been affirmed twice – first by the D.C. Circuit in 1984 and again by the Eighth Circuit in 1997.⁸ The Commission re-iterated its position in its 1998 Universal Service *Report to Congress*, observing that “information service providers are not subject to regulation as common carriers”⁹ and therefore, are not required to pay carrier access charges.¹⁰

There is no justification for singling out ISPs – alone among all categories of end users – for special regulatory obligations. The Commission has previously considered, and rejected, claims that the charges that ISPs pay for network services are not compensatory.¹¹ Indeed, the Commission has concluded that the cost to terminate ISP traffic is no different from the cost to terminate any other type of traffic.¹² Rather than extend the carrier access charge regime to

that imposition of carrier access charges on ESPs would result in significantly lower charges to end users); *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1, 168 (1988) (noting that ESPs “will continue to be able to take local business lines, or other state-tariffed access arrangements, instead of federal access, in the same manner as other end users.”); *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, 2632-33 (1988) (terminating docket opened to consider whether to extend carrier access charge regime to ESPs).

⁸ See *Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523, 541-44 (8th Cir. 1998); *NARUC*, 737 F.2d at 1136-37.

⁹ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11511 (1998).

¹⁰ *Id.* at 11552.

¹¹ *Access Charge Reform Order*, 12 FCC Rcd at 16133-34 (“We . . . are not convinced that the nonassessment of access charges results in ISPs imposing uncompensated costs on incumbent LECs. ISPs do pay for their connections to incumbent LEC networks by purchasing services under state tariffs.”).

¹² See, e.g., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, 9194 (2001) (“[A] LEC generally will incur the same costs when delivering a call to a local end user as it does delivering a call to an ISP.”); see also *Access Charge Reform Order*, 12 FCC Rcd at 16133 (“[M]any of the characteristics of ISP traffic . . . may be shared by other classes of business customers.”).

currently unregulated ISPs, the Commission should make clear that ISPs will continue to pay the same end-user charges as other end users.

II. THE COMMISSION SHOULD REJECT THE EXPANDED PORTLAND GROUP'S PROPOSAL TO REQUIRE ISPs TO PAY CARRIER ACCESS CHARGES IN CERTAIN CASES

The Commission has sought comment on a plan developed by the Expanded Portland Group ("EPG"). Under the EPG Plan, the Commission would "eliminate the ESP exemption for ISPs terminating traffic to the PSTN," such as providers of Voice over Internet Protocol ("VoIP") services, while allowing ISPs "to continue to use flat-rated business lines to receive calls from their customers."¹³ The Commission should reject this ill-conceived proposal.

The Expanded Portland Group makes two basic arguments in support of its proposal. First, the EPG asserts that some ISPs are now improperly using state-tariffed business lines to "terminate VoIP traffic over the local exchange network."¹⁴ This, the EPG claims, enables some ISPs to avoid paying "clearly applicable" carrier access charges.¹⁵ Second, the EPG repeatedly notes that, since their inception, "access rates have come down significantly."¹⁶ Neither of these arguments provides a basis on which to require ISPs to pay carrier access charges.

Contrary to the EPG's assertion, the Commission's carrier access charge regime is not applicable to information service traffic -- even if it is "terminated" on the PSTN. ISPs often allow their customers to send information to third parties who are connected to the PSTN. For

¹³ Notice at ¶ 45.

¹⁴ Expanded Portland Group, A Comprehensive Plan for Inter-carrier Compensation Reform, *Developing a Unified Inter-carrier Compensation Regime*, CC Docket No. 01-92, at 19 (filed Nov. 2, 2004).

¹⁵ *Id.*

¹⁶ *Id.* at 18-19.

example, an ISP can provide an e-mail service that enables its customers to send information to third parties. If a recipient subscribes to a dial-up Internet access service, he will receive this information over the PSTN. Because e-mail service is an information service, the ISP is not required to pay carrier access charges – even though the traffic is being “terminated” over the PSTN. Similarly, an ISP can provide an IP-enabled voice application that allows its customers to send information to third parties, many of whom receive the information over a PSTN connection. So long as the application constitutes an information service – as most VoIP applications do – the ISP is not obligated to pay carrier access charges.

The fact that per-minute access charge rates have declined does not provide any justification for imposing these charges on ISPs. As the Commission has previously recognized, “The access charge system was designed for basic voice telephony provided over a circuit-switched network, and even when stripped of its current inefficiencies it may not be the most appropriate pricing structure for Internet access and other information services.”¹⁷ Therefore, although access charge rates have fallen significantly, the Commission repeatedly has declined to extend carrier access charges to ISPs. The EPG has provided no basis for the Commission to depart from this long-standing position.

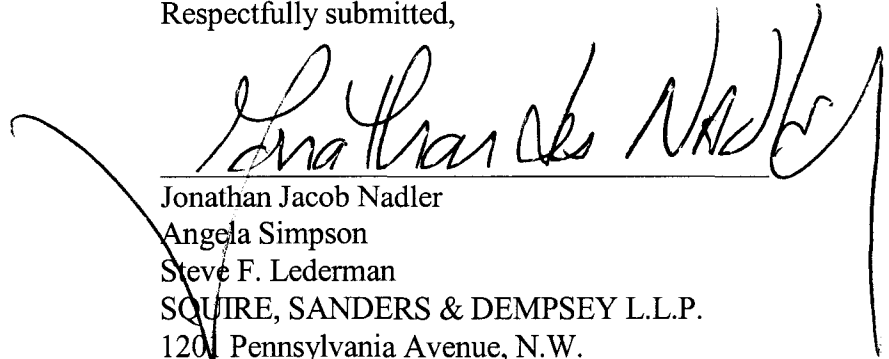
CONCLUSION

The Commission should fundamentally *reform* the intercarrier compensation regime, but should not *extend* that regime to information service providers. Rather, the Commission should reaffirm that ISPs are end users of communications services – not common carriers – and, therefore, are not subject to any intercarrier compensation regime. In particular, the Commission

¹⁷ *Access Charge Reform Order*, 12 FCC Rcd at 16134.

should reject the proposal, advanced by the Expanded Portland Group, to apply the current carrier access charge regime to certain ISPs.

Respectfully submitted,

A large, stylized handwritten signature in black ink, which appears to read "Jonathan Jacob Nadler". The signature is written over a horizontal line.

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